

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

C. EARL GRANT,

Plaintiff,

DECLARATION

vs.

NATIONAL BOARD OF MEDICAL EXAMINERS and
FEDERATION OF STATES MEDICAL BOARD,

Civil Action No.
7:07-cv-00996
(TJM-GJD)

Defendants.

Gerard F. Dillon, declares under penalty of perjury, pursuant to 28 U.S.C. §
1746, as follows:

1. I am employed by the National Board of Medical Examiners (“NBME”) as Vice President, United States Medical Licensing Examination® (“USMLE®”). I have personal knowledge of the facts set forth herein and if called could testify competently thereto.

2. In my position at NBME, I am responsible for coordinating USMLE activities at the NBME, including implementing and coordinating USMLE policies, developing an appropriate program design, overseeing the composition and activities of test committees, developing a research agenda, and serving as a liaison with external groups.

3. NBME is a private, non-profit corporation which, together with the Federation of State Medical Boards (“FSMB”), has created and established the USMLE.

4. The USMLE is an examination accepted by individual state medical licensing authorities to assess the qualifications of candidates for medical licenses. Consequently, the USMLE tests minimum knowledge and skills considered important for the safe and effective practice of medicine.

5. The mission of NBME is to protect the health of the public by providing a common, consistent system of assessment for all doctors seeking medical licensure in the United States. Maintaining the integrity of the USMLE testing process is, therefore, a critical part of NBME's public safety mission.

6. There are three parts of the USMLE, known as "Steps." Step 1 assesses whether an examinee understands and can apply important concepts of the sciences basic to the practice of medicine, with a special emphasis on the principles and mechanisms underlying health, disease and modes of therapy. For students in accredited U.S. medical schools, Step 1 generally is taken at the end of the second year, after completing the basic science curriculum.

7. Step 2 assesses whether an examinee demonstrates the fundamental clinical knowledge and skills essential for safe and effective patient care under supervision. Step 2 consists of separate Clinical Knowledge ("CK") and Clinical Skills ("CS") components, and is generally taken by students in accredited U.S. medical schools during their fourth year. NBME first administered Step 2 CS in 2004.

8. Step 3 assesses whether an examinee can apply the medical knowledge and understanding of biomedical and clinical science essential for the unsupervised practice of medicine. It is taken after the receipt of the medical degree, usually during the first few years of residency training.

9. For most examinees, the Step 3 exam takes place over two days.

Examinees with disabilities as defined by the Americans with Disabilities Act may be granted additional test and/or break time as an accommodation, thereby extending the exam over a period of three or more days.

10. The Step 3 examination is delivered in two parts: a multiple choice portion and a computer-based case simulation (“CCS”) portion. In the CCS portion, the computer presents a simulated patient to the examinee, who decides which diagnostic information to obtain and how to treat and monitor the patient’s progress in computer-simulated time.

11. The examinee can request information from the simulated patient’s history and physical examination, order laboratory studies, procedures and consultations, and start medications and other therapies.

12. A computer records each action by the examinee, and provides new data and situations based upon the simulated patient’s underlying problem and the examinee’s actions. The examinee must, in turn, evaluate and react to the new data provided by the computer. During the scoring process (discussed below at paragraphs 19 through 28), the computer scores the examinee’s overall performance by comparing the examinee’s recorded actions against those that are identified by content experts as being appropriate for the simulated patient case.

13. Actions resembling a range of optimal strategies will produce a higher score. Dangerous and unnecessary actions will detract from the examinee’s score. The CCS portion of the Step 3 examination requires an examinee to balance thoroughness, efficiency, avoidance of risk and timeliness in responding to a clinical situation. This

permits the assessment of examinees' clinical decision-making skills in a realistic and integrated manner.

14. All medical licensing authorities in the United State that license allopathic (M.D.) physicians accept passage of all three steps of the USMLE to satisfy the examination requirements for licensure as a physician. Passing all three steps does not, however, automatically entitle an examinee to receive a medical license. Each state licensing authority has its own licensure requirements that a candidate must meet to practice medicine.

15. Prior to 1999, USMLE and its predecessor examinations were administered in paper and pencil format, on limited, fixed examination dates in intensely-proctored environments. In 1999, all three steps of the USMLE were converted from paper and pencil-based examinations to a computer-based testing format. This change released examinees from the restriction of fixed testing dates, enabled rapid reporting of scores, facilitated extension of the USMLE to more international examination sites, and eliminated certain security concerns.

16. Step 1, Step 2 CK and Step 3 of the USMLE are administered through a test delivery vendor, Prometric® Inc. ("Prometric®"). Steps 1 and 2 CK are continuously administered at authorized Prometric test centers around the world. Step 2 CS, which requires the examinee to interact with individuals trained to portray various medical conditions, is administered at five regional Clinical Skills Evaluation Centers in the United States. Step 3 is continuously administered at authorized Prometric test centers in the United States.

17. Each year, thousands of medical students, medical residents and candidates for medical licensure take the USMLE. For example, in 2007, NBME administered over 41,000 Step 1 examinations, over 35,000 Step 2 CK examinations, over 33,000 Step 2 CS examinations, and over 30,000 Step 3 examinations.

18. NBME is responsible for scoring all three Steps of the USMLE. To ensure the integrity and meaning of the scores and preserve their important role in the medical licensure process, each examination for every Step is administered and scored using standard procedures. This ensures that no examinee or group of examinees receives unfair advantage over another on the examination, and allows the state licensing boards to be confident that the USMLE is a reliable and fair measure of each examinee's medical knowledge.

The Step 3 Examination Scoring Process

19. When an examinee takes the Step 3 examination, the computer records his or her responses (the "Response Record"). After the test ends, Prometric electronically bundles the examinee's Response Record with other Response Records from that testing center, encrypts the data and transmits it over secure lines to Prometric's data center. NBME electronically retrieves stored examination data from Prometric's data center via secure transmission lines and stores it in a secure database until it is scored.

20. Once a week, NBME electronically pulls the stored Response Records, decrypts them, and scores them using a computerized scoring program (the "Scoring Software"). This computerized scoring ensures that each examinee's Response Record is accurately scored, in the same manner and using the same methodology as is used for every other examinee.

21. The Scoring Software generates the following scores for each Step 3 Response Record: (a) a multiple choice raw score, (b) a CCS raw score, (c) a combined raw score, (d) a two-digit reported score, and (e) a three-digit reported score (collectively, the “Original Scores”).

22. The multiple choice raw score represents the number of items answered correctly and the CCS raw score represents the number of points obtained in managing the simulated patient. The combined raw score (the multiple choice raw score plus the CCS raw score) is then electronically converted into two equivalent reported scores, one on a three-digit scale and one on a two-digit scale. Both scales are used for score reporting purposes.

23. The two-digit score is derived from the three-digit score. It is used in score reporting because some states have statutory provisions that require a “passing score of 75.” The two-digit score is derived in such a way that a score of 75 corresponds to the minimum passing score on the three-digit scale.

24. To preserve the integrity and predictability of the Step 3 results, the scoring process is completely automated. In other words, computers perform all of the substantive tasks necessary to generate a final score for a Response Record, from the time that the computer records the examinee’s responses to the time that a score report is generated and made available to the examinee. Every Step 3 examination is scored using the same process.

The Quality Assurance Process

25. NBME employs standard quality assurance procedures to ensure that each Response Record is correctly scored. Thus, in addition to scoring each Step 3

examination by computer using the Scoring Software, NBME also scores each examination using a second, separate software program (the “QA Software”).

26. The QA Software also generates a multiple choice raw score; a CCS raw score, a combined raw score, a two-digit reported score, and a three-digit reported score for each Response Record (collectively, the “QA Scores”).

27. The QA Scores are electronically compared to the Original Scores, and any discrepancies are flagged for further review. If no discrepancy exists, the Original Scores are deemed valid, are moved to a “ready for reporting” queue, and are reported to examinees.

28. Because of the standardized and careful design of the scoring process, discrepancies rarely occur. However, if comparison of the QA Scores and the Original Scores does reveal a discrepancy, NBME personnel investigate and resolve it. Once the discrepancy is resolved, the accurate score is reported to the examinee.

Score Reporting

29. For exams administered prior to 2007, NBME printed final score reports and mailed them to examinees. Examinees ordinarily received their score reports approximately four to six weeks after taking the test.

30. Since 2007, NBME has made score reports available electronically. Examinees receive email notification that the score report is available, along with instructions on how to access it.

31. All score reports include a pass/fail designation, numerical scores (on the two and three-digit scale) and graphical performance profiles summarizing areas of strength and weakness to assist the examinee with self-assessment.

32. Although NBME and FSMB provide a “recommended” minimum passing score to the state licensing authorities, NBME and FSMB are not responsible for determining whether a candidate achieves a score considered necessary by the state licensing authority to obtain a license to practice medicine in that jurisdiction. The decision regarding the minimum scores necessary to satisfy the examination requirements for medical licensure rests with each state’s licensing authority.

Requests for Score Rechecks

33. NBME and FSMB together annually publish a Bulletin of Information for the USMLE (the “*Bulletin*”). App. Ex. 1 (2003 *Bulletin*), 2 (2004 *Bulletin*), 3 (2005 *Bulletin*), and 4 (2006 *Bulletin*). The current *Bulletin* is made available for review and can be downloaded from the USMLE website.

34. As part of the application process for each Step of the USMLE, a prospective examinee must certify that he or she has read and understands the *Bulletin*, and that he or she agrees to comply with the policies and procedures it sets forth.

35. The *Bulletin* describes in detail the purpose of, eligibility requirements for, and general content outline of each Step of the USMLE, as well as the application process, test regulations, rules of conduct, and the process for scoring and score reporting. App. Ex. 1, p. 2-8; 2, p. 1-8; 3, p. 1-11; and 4, p. 2-12.

36. The *Bulletin* also describes the process for requesting score rechecks. Because NBME uses standardized, computer-based scoring methods and a rigorous quality assurance process, the *Bulletin* cautions examinees that a change in score or pass/fail outcome based upon a recheck is an extremely remote possibility. App. Ex. 1, p. 21; 2, p. 21; 3, p. 27; 4, p. 28-29.

37. Nevertheless, examinees may request score rechecks by submitting a written request and paying the required service fee. All requests for score rechecks must be received by the registration entity no later than ninety days after the examinee's score report was released. App. Ex. 1, p. 21; 2, p. 21; 3, p. 27; and 4, p. 28-29.

38. The *Bulletin* identifies FSMB as the registration entity for the Step 3 examination, and provides contact information. App. Ex. 1, at p. 26; 2, at p. 26; 3, p. 32; 4, at p. 33.

39. When FSMB receives a timely and complete score recheck request, it notifies NBME, which electronically retrieves the examinee's original Response Record and rechecks it using the QA Software. The results are then electronically compared with the examinee's Original Scores.

40. If a discrepancy is identified, it is investigated, resolved, and the correct two and three-digit scores are then reported. If no discrepancy is identified, the examinee is notified that the original scores were correct as reported.

Dr. Grant's Step 1 Examinations

41. Plaintiff took and failed the Step 1 examination without any test accommodation 4 times: on June 8, 1994, September 22, 1994, June 14, 1995, and September 27, 1995. App. Ex. 5.

42. NBME released the results for plaintiff's first 4 attempts at Step 1 on July 9, 1994; November 3, 1994; July 26, 1995; and November 8, 1995, respectively.

43. On November 19, 1994, Dr. Grant requested a score recheck of his September 1994 Step 1 exam. App. Ex. 6.

44. On December 7, 1994, NBME informed Dr. Grant that the score recheck confirmed his scores were accurate as originally reported. App. Ex. 7.

45. On August 10, 1995, Dr. Grant requested that NBME review and rescore his June 1995 Step 1 exam. App. Ex. 8.

46. On August 29, 1995, NBME informed Dr. Grant that the score recheck confirmed his scores were accurate as originally reported. App. Ex. 9.

47. Dr. Grant did not request rescoring of his June 1994 or September 1995 Step 1 exams.

48. On June 11, 1996, Dr. Grant took and passed the Step 1 examination with a test accommodation. App. Ex. 10.

49. NBME released the results for plaintiff's June 11, 1996 Step 1 examination on July 23, 1996.

Dr. Grant's Step 2 Examinations

50. Dr. Grant took and failed the Step 2 CK examination with test accommodations three times: on August 26, 1997, March 3, 1998, and August 25, 1998. App. Ex. 11, 12, 13; see also App. Ex. 5.

51. NBME released the results of plaintiff's first three attempts at Step 2 CK on October 7, 1997; April 14, 1998; and October 6, 1998, respectively.

52. On December 6, 1997, Dr. Grant requested a score recheck of his August 1997 Step 2 CK examination. App. Ex. 14.

53. NBME performed a score recheck in accordance with its standard procedures. On January 6, 1998, informed Dr. Grant that the score recheck confirmed his scores were accurate as originally reported. App. Ex. 15.

54. On May 4 and June 17, 1998, Dr. Grant requested that his March 1998 Step 2 examination be rescored. App. Ex. 16.

55. NBME performed a score recheck in accordance with its standard procedures and, on June 22, 1998, informed Dr. Grant that the score recheck confirmed his scores were accurate as originally reported. App. Ex. 17.

56. In a November 20, 1998 letter, NBME again reported that score rechecks of Dr. Grant's August 1997 and March 1998 Step 2 CK exams confirmed his original scores were accurate as reported. App. Ex. 18.

57. On December 5, 1998, Dr. Grant requested that his August 1998 Step 2 exam be rescored. App. Ex. 19.

58. NBME performed a score recheck in accordance with its standard procedures and, on December 16, 1998, informed Dr. Grant that the score recheck confirmed his scores were accurate as originally reported. App. Ex. 20.

59. Dr. Grant took and passed the Step 2 CK examination with a test accommodation on March 2, 1999. App. Ex. 5.

60. NBME released the results for plaintiff's March 2, 1999 Step 2 CK examination on April 13, 1999.

Dr. Grant's Step 3 Examinations

61. Dr. Grant took the Step 3 USMLE on 5 separate occasions: July 9, 2003, July 21, 2004, December 7, 2004, July 25, 2005 and November 1, 2006. App. Ex. 5. Each of these Step 3 exams was administered in a computerized format.

62. As provided for in a 1998 settlement agreement between Dr. Grant and NBME, Dr. Grant received test accommodations for each of these exams. App. Ex. 21, 22, 23, 24, and 25.

63. NBME scored each of Dr. Grant's Step 3 examinations in accordance with its standard procedures. Specifically, upon completion of the examination, Prometric batched the examinees' Response Records, including Dr. Grant's, and electronically transmitted them to its data center, where they were stored in a secure database.

64. NBME then electronically retrieved the Response Records from Prometric, including Dr. Grant's, and stored them in a secure NBME database. Dr. Grant's Response Record was subsequently scored using the Scoring Software in the same manner that all other Step 3 Response Records were scored.

65. Dr. Grant's Response Record was also scored using the separate QA Software, just like every other examinee's Response Record. The computer then electronically compared Dr. Grant's Original Scores with his QA Scores. The computer did not identify any discrepancies between Dr. Grant's Original Scores and his QA Scores. Accordingly, a score report was issued reflecting the two and three-digit scores generated by the Scoring Software. App. Ex. 21, 22, 23, 24, and 25.

66. This process was followed for each of the Dr. Grant's Step 3 examinations. Dr. Grant received the following scores:

<u>Step 3 Examination Date</u>	<u>Two- Digit Score</u>	<u>Three- Digit Score</u>
July 9, 2003	65	157
July 21, 2004	67	166
December 7, 2004	66	164
July 25, 2005	64	160
November 1, 2006	65	161

App. Ex. 21, 22, 23, 24, and 25, respectively.

67. When Dr. Grant took his July 2003 Step 3 examination, the minimum pass-score required by all state licensing authorities was either 75 on the two-digit scale, or 182 on the three-digit scale. On April 1, 2004, the three-digit pass-score was changed to 184. Therefore, for each subsequent Step 3 Examination taken by Dr. Grant, the minimum pass-score required by all state licensing authorities was either 75 on the two-digit scale or 184 on the three-digit scale. Dr. Grant's two and three-digit scores on each of his Step 3 examinations fell below these minimum requirements.

68. As described in the Declaration of David A. Johnson in support of defendants' motion for summary judgment, Dr. Grant timely requested a score recheck only for the July 21, 2004 Step 3 examination. App. Ex. 26; *see* Johnson Decl., ¶¶ 16-20. NBME performed a score recheck for that examination in accordance with its standard procedures.

69. NBME electronically pulled Dr. Grant's original July 21, 2004 Response Record from its database, and performed a score recheck using the separate QA Software. NBME then electronically compared the multiple choice raw score, the CCS raw score, the combined raw score, the two-digit reported score and the three-digit reported score with the original scores obtained from the Scoring Software. This is the same process NBME uses for all other Step 3 score recheck requests.

70. Results of the electronic comparison established that there were no discrepancies between the Original Scores and the rechecked scores, and therefore that Dr. Grant's original scores were correct as reported.

71. NBME communicated the results to FSMB and, on October 28, 2004, FSMB reported the results of the score recheck to Dr. Grant. App. Ex. 27.

72. Dr. Grant's requests for score rechecks on his other Step 3 examinations were untimely and, therefore, were denied. *See* Johnson Decl., ¶¶ 23 and 26.

Dated: December 5, 2008

s/Gerald F. Dillon

Gerard F. Dillon